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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1012

DAVID HENRY MITCHELL, III,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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January 27th, 1967.

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on December 5, 1966, petition for rehearing denied on January 3, 1967.

Opinion Below

The opinion of the Court of Appeals is not reported and is printed at PA-A, P. 19. It affirmed a judgment of conviction of petitioner for failing to report for induction into the armed forces in violation of an order issued allegedly pursuant to 50 U.S.C., Sec. 462. Petitioner was tried in the district court by a jury and there is no opinion of that court.

Jurisdiction

The judgment of the United States Court of Appeals was entered on December 5, 1966, PA-B, P. 22, petition for rehearing denied on January 3, 1967. PA-C, P. 23. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Do the President and Congress have such unlimited constitutional power that the Executive may use, according to his discretion, the armed forces of the United States in Southeast Asia and so that a draft board may participate in the execution of this power, without judicial determination of the constitutionality of the acts of the President, the Congress and the draft board in authorizing and issuing a draft board order when a defendant citizen of the United States on trial for his liberty offers to prove an interlinked chain of unconstitutional acts and treaty violations that make the order void? Is not the denial of that opportunity to prove on the ground of "immateriality" a denial of the "due process of law" guaranteed by the Fifth Amendment?

2. Was the Court below correct in ruling, without a trial and determination on the merits of the issues of fact and law, that the draft board's act in issuing the order violated was not subject to challenge as part of an unconstitutional series of acts by the President and the Congress? Is it correct for a court, endowed with the duty of upholding the constitutional rights of an indicted citizen, to refuse to allow a trial of the citizen's contentions of unconstitutionality?

3. A defendant in an ordinary criminal case has the right to prove that the relevant statute, rule, regulation or order he violated, is being administered pursuant to a conspiracy to deprive him of his constitutional rights. Is not the same right to offer such evidence possessed by a draft board registrant who violates an allegedly legal order to report for induction?

4. In view of the Charter of the United Nations and other International treaties to which the United States is signatory and Article VI of the Constitution of the United

States making such treaties "the supreme law of the Land" and requiring that "the Judges in every State shall be bound thereby", does the President of the United States have the Constitutional power, as Commander-in-Chief of the armed forces and the Executive in charge of enforcement of the Selective Service system, to send the armed forces of the United States into battle outside the continental limits of the United States, if such action is in violation of such treaties and Constitutional provisions?

5. Were not the Courts below bound, in protecting petitioner's due process as regards Questions 1, 2 and 3, to submit the above issues to the test of evidence and applicable law in order to determine whether the draft law is currently being applied to petitioner unconstitutionally in disregard of its legal limitations of authority and purpose *and* in violation of treaties, which in conformity with Constitutional authority and procedures have been given the force of law—binding upon all citizens to obey and all Courts to uphold and enforce?

6. Did the Court of Appeals properly discharge its appellate function in failing to rule on the merits of any of the Questions presented to it? Was it proper for it to reformulate appellant's appeal so as to avoid determination of these questions on the merits?

Constitutional Provisions and Treaties Involved

A. Constitutional Provisions Involved

"We the People of the United States, in Order to form a more perfect Union, establish Justice * * * provide for the common defence * * * do ordain and establish this Constitution for the United States of America * * *.

Article I.

Section 8. The Congress shall have Power To * * * provide for the common Defence * * *

To declare War * * *;

To raise and support armies * * *;

To provide and maintain a Navy

Article II.

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States * * *.

Article VI.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby * * *."

Fifth Amendment

"No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

B. International Treaties, Agreements and Assurances

Since these provisions are lengthy, their pertinent text is set forth in the appendix (PA-D, P. 24).

Statement of the Case

Summary of the Facts

As stated in the opinion of Judge Medina below:

> "After initially registering with Selective Service Local Board 17, appellant 'disaffiliated' himself from the Selective Service and thereafter refused to co-

operate with his Board in any respect. In August, 1964, appellant was classified 1A and did not appeal. Subsequently he was ordered to report for induction on January 11, 1965. Appellant acknowledged receipt of this notice by letter but did not report as ordered.

Appellant was indicted for violation of 50 U.S.C., Appx., Section 462, tried and found guilty. This Court reversed the first conviction because the trial judge had failed to allow sufficient time for appellant to obtain counsel. *United States* v. *Mitchell,* 354 F. 2d 767 (2 Cir. 1966). He was retried before Judge Clarie and a jury. The wilfulness of his failure to report for induction was all too apparent; and he was again convicted and sentenced to five years imprisonment. At trial appellant made no claim to be a conscientious objector but sought to produce evidence to show that the war in Vietnam was being conducted in violation of various treaties to which the United States is a signatory and that the Selective Service system was being operated as an adjunct of this military effort. Judge Clarie ruled out all such evidence as immaterial and this ruling is assigned as error."

The Opinion Below

In sustaining the judgment below and refusing to reverse for the error assigned, Judge Medina stated for the Court:

"'* * * as appellant asserts that the Selective Service and not merely the conduct of the war in Vietnam, is illegal, his defenses would seem not to be premature.

Nevertheless, appellant's allegations are not a defense to a prosecution for failure to report for induction into the Armed Forces and his evidence was properly excluded. Regardless of the proof that appellant might present to demonstrate the correlation between the Selective Service and our nation's efforts in Vietnam, as a matter of law, the congressional power 'to raise and support armies' and 'to provide and main-

tain a navy' is a matter quite distinct from the use which the Executive makes of those who have been found qualified and who have been inducted into the Armed Forces. Whatever action the President may order, or the Congress sanction, cannot impair this constitutional power of the Congress." (PA-A, P. 19)

Petitioner's Statement to the Draft Board

On February 10, 1964, the defendant wrote to the clerk of the draft board explaining why he refused to cooperate with the board:

> "I oppose the draft, not as something wrong for just me or wrong for only certain people, but as something wrong for the peace and survival of the world. Selective Service is the criminal in this case, as can be judged by American militarism throughout the world—from Cuba to Panama to South Vietnam, and by our basing of policies on nuclear war. I refuse to cooperate in any way which would support the continuance of such activities. I certainly wouldn't have worked in a Nazi concentration camp just because I would not have to tend the ovens or the gas but could be a guard or a clerk. Rather, as I am doing with the draft and the militarism it contributes to, I would have disassociated from such wrong and worked against it." (Defendant's Exhibit A-17, R. 913)

During June 1964 after he was notified to report for induction on June 10, 1964, he wrote to the draft board again:

> "Many draft refusers fail to get down to the political issues in their cases; many refuse to contest their own 'legal guilt' in court. Yet an effective way of challenging our government's policies and morality is by maintaining a not guilty plea in the courts. The position of individual guilt and individual responsibility, and therefore one's obligation to dissociate

himself from war crimes, is established—not only philosophically by Thoreau, etc.—but historically and legally by Nuremberg International Law which is part of the law of every country. Under International Law, the United States is guilty of crimes against peace and is also in violation of the Kellogg-Briand Pact, other international agreements, and Article 2, Section 4 of the United Nations Charter which prohibits a policy of force and threats of force. Only if we served as accomplices in these activities would we be guilty morally or legally." (Defendant's Exhibit A-27)

The Evidence of the Government

The government called but one witness, Mrs. Edith Moriarty, the clerk of the local draft board (R. 834). She testified that she had mailed the notice to report for induction to the defendant and the government introduced portions of defendant's draft board file through her. The entire file was introduced through Mrs. Moriarty by the defendant (R. 864). The file contained the defendant's responses to the draft board referred to hereinafter.

The Limited Evidentiary Presentation Permitted to Petitioner by the District Court

Two witnesses who had returned from North Viet Nam testified (R. 951-970). Neither was permitted to testify about his visit to North Viet Nam or that which he had observed while there, the court ruling that such information was not material.

The defendant testified that he did not report for induction on January 11, 1965 although he had received an order to so report (R. 1006).

He testified that the conduct of the United States in Viet Nam was violative of international treaties to which the United States was signatory and that he would not participate in such unlawful conduct (R. 1006-1008). He testified

that he had originally refused to report for induction because he accepted the principles enunciated at the Nuremberg Trial and that the United States had indeed sponsored the Charter of the International Military Tribunal. He testified:

> "* * * I was obliged and had a duty and responsibility, not just morally, but also legally, because of the Nuremberg judgment, which laid down principles of individual responsibility and guilt, which transcends those of a nation, to refuse to cooperate with the draft, which was engaged in, as the major instrument for securing manpower for various criminal activities around the world; notably, Viet Nam, where we were stepping up activity there in behalf of Diem at that time." (R. 1001-1002)

The defendant stated that the known facts persuaded him that the very presence of American troops in Viet Nam was violative of international agreements and that troops were, in addition, participating in torture, and the use of weapons of war, including the spraying of chemicals and gas, outlawed by international treaty to which the United States was signatory (R. 1002-1003, 1008).

The defendant further testified:

> "And, by doing this we have violated a number of other treaty obligations, such as Nuremberg, as I mentioned, the Geneva Convention, regarding torture of prisoners, treatment of civilians, and bombings, and violated the Hague Rules and Regulations of War, in terms of using poisonous chemicals, and the bombing of civilian crops and villages, and the bombing and burning of civilians themselves.
>
> And, because of all this I therefore could not surrender myself into any type of complicity with the Draft System, since it is a major instrument in the carrying out of all these policies. And, if I did, I

would be guilty of not only violating my conscience, but violating specific laws which apply not to just the Germans, because the Germans were tried by them, but, to all men and Americans." (R. 1005)

The defendant then moved the court to produce two witnesses in the custody of the government, each of whom had served as a sergeant with the Special Forces in Viet Nam, each of whom had been captured, released and had made widely published statements charging that the United States Government had no right to be in Viet Nam based upon their own observations (R. 1010). At the time of the trial both men were held in the custody of the United States Government and both were reported to have been held incommunicado and charged with violating Section 104 of the Uniform Code of Military Justice (R. 1011). The Court denied the application holding that were testimony of that nature offered it would be immaterial to the issues of the case.

The defendant then moved the Court to issue subpoenas under Criminal Rule 17 (b) to be served upon a reporter, now in the United States, previously a correspondent for the New York Times in Viet Nam, a former sergeant with the Special Forces in Viet Nam, now in the United States, and a reporter for the New York Post, formerly assigned to Viet Nam. Counsel for the defendant assured the Court, in support of the motion, that he had spoken with all three of the persons for whom the subpoenas were sought and that each would testify, if called, as to the illegal conduct of the American presence in Viet Nam (R. 1012-1013). The Court denied the application holding that such evidence was immaterial.

The defendant moved the Court for the issuance of a subpoena directed to the Director of the Selective Service System so as to demonstrate that that system was presently being employed by the government for the purpose

of carrying out an illegal war in Viet Nam. For reasons of materiality that application was denied (R. 1013-1014).

It might be noted at this point that the government's only witness had testified in such a fashion as to indicate that the war in Viet Nam evidently was the cause of increased draft calls. The record would indicate as well that the undeclared war in Viet Nam may well have been the proximate cause for the induction order sent to the defendant (R. 915-918).

The defendant then moved for permission to take depositions abroad of one American and several Vietnamese then in Viet Nam (R. 1014, 1018, 1019). The defendant stated that each of those sought to be deposed would testify to the bombing of civilian personnel by American bombers or to the extensive and regular use of poison chemicals and toxic gases by the American forces (R. 1019). The Court again denied the application holding that the, "* * * subject matter would be immaterial and irrelevant, * * *" (R. 1020).

The Court's Charge to the Jury

The Court instructed the jury that Title 50, U. S. Code, Section 462 was the one statute with application to this case. "This statute with which we are concerned, reads in part as follows—it is Title 50, U. S. Code, Section 462: * * *" (R. 1932, and Appendix to Appeal Brief p. 24a).

While the Court specifically referred to other statutes it did so not for the purpose of assisting the jury to understand their meaning but to enjoin them from considering them.

> "I might add at this point one further instruction, and that is that as a matter of law, I charge you that none of the treaties referred to in the evidence in this case, namely, the Treaty of London, referred to as the

Nuremberg Trial; the Treaty of Paris, referred to as the Kellogg-Briand Pact; the United Nations Charter; the Geneva Agreement of 1954, or the Hague Convention, interfere in any manner in respect to this defendant fulfilling his duty under this order." (R. 1035, 1036 and Appendix to Appeal Brief p. 26a)

The Court instructed the jurors that to convict the defendant they must find that the Board issued a valid order, that the defendant received notice of the order, that the defendant failed to report for induction and that he did so knowingly and willingly (R. 1037 and Appendix to Appeal Brief p. 27a). The task confronting the jury was indeed rendered simple by the Court's exclusion of the evidence offered by the defendant and by the Court's charge that international treaties signed by an American president and ratified by the United States Senate have no place in an American Court and may not be utilized to demonstrate the invalidity of the order issued to the defendant.

The Motion to Dismiss the Indictment

At the conclusion of the government's case the defendant moved to dismiss the indictment on the grounds that the selective service system was being utilized as an instrument to carry out the war in Viet Nam and that the United States was violating international treaties, which after being ratified by the United States Senate became the law of the United States as well (R. 945-946). The defendant stated that were he to cooperate with the United States Armed Forces he too might be guilty of unlawful conduct (R. 948, 949). The motion to dismiss was denied by the Court (R. 950).

Questions Presented in the Court of Appeals

1. Is the United States bound by international treaties which it has ratified?

2. If it is, may not a citizen refuse to obey a national law rendered invalid by a treaty in order to avoid possible punishment under existing treaty obligations?

3. In these circumstances is it not mandatory for the trial Court to permit the jury to hear evidence that the defendant believes will prove that the national law, as applied is rendered invalid?

4. Should not the Court have the obligation as well to charge the jury regarding the meaning of the treaties and the obligations that they impose and is it not error for the Court to instruct the jury to disregard the treaties and the obligations that flow from them?

5. In the absence of an affirmative answer to each of the above four questions is not the Court stating that if the Government of the United States emulated the Nazis in every respect, including the commission of the specific war crimes for which many Germans were tried and punished by the International Military Tribunal, that citizens of the United States would have a solemn obligation to participate in such criminal activity and cooperate with those who organize them?

Reasons for Granting the Writ

I.

In terms of the depths of present tragedy and potential catastrophe facing the United States of America this is the most important appeal to be filed in this Court since the Dred Scott decision.

Behind the bland "head-in-the-sand" opinion of Judge Medina in the Court below lurks a denial of the presence of issues that are profound and pregnant with the gravest Constitutional crisis in the history of the Nation since the Civil War. In denying a judicial resolution of these issues,

the Court below has not merely denied a 24-year-old representative of the more thoughtful and committed youth of America but the entire Nation a responsible judicial resolution of questions that have troubled varying grades of responsible statesmen and thinkers ranging from the Chairman of the Senate Foreign Relations Committee, the Majority Leader of the Senate and others to the most respected members of the academic, religious, scientific and cultural communities.

> **In view of the statement of the Chairman of the Senate Foreign Relations Committee that he is "very apprehensive" that the United States may have assumed a commitment in Vietnam that is "not in the interests of this country" (The New York Times, January 17, 1967, p. 3), may the youth of this country who agree with him be imprisoned for up to five years for agreeing with him and doing all in their power to resist cooperating in acts, which subject to proof as offered and excluded below, may show them not to be "in the interests of this country"?**

The Rev. Dr. Reinhold Niebuhr, the world-renowned Protestant theologian, on January 19, 1967:

> **". . . characterized the Vietnam conflict as a 'fantastic adventure of United States imperialism in an Asian civil war while we at home are trying to clean our air, clean our water, clean our ghettos and fight for racial justice.'**
>
> **Throughout his talk he repeatedly referred to the Vietnam war as 'fantastic' and 'tragic.'***
>
> **Dr. Niebuhr reviewed the history of American involvement in Vietnam, from the days of 'advisory' participation to the present, when 'billions have been spent and 6,000 men have died.'**

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* It is petitioner's contention that this Court has the constitutional power and imperative duty to terminate or limit this tragedy.

It is no longer a case of 'simple withdrawal,' he told the seminarians. 'We are in too deep and what is at stake is imperial prestige.'

'Couldn't somebody just say we made a mistake?' he asked. 'We have been drawn into this situation by one fantastic chapter after another, obviously stumbling into the quagmire. But political leaders never make mistakes, or else they would be challenged by the opposition.' " The New York Times. January 19, 1967, p. 4.

Further, the United States is signatory to a substantial body of International law which is meant to preserve world order and prevent repetitions of acts of aggression and inhumanity, especially today when such acts can lead the world down the road to the final holocaust. These laws and the attempts they represent become meaningless unless courts apply them as bound, and litigants are allowed "due process" to seek a determination of their applicability to specific situations and the evidence thereon. Only twenty years ago the United States was an initiator and participant in a series of trials at Nuremberg designed not merely to try the Nazis but to establish a legal precedent. The laws promulgated at Nuremberg have gained the endorsement of the international community of nations and have been reaffirmed by resolution in the General Assembly of the United Nations.

Supreme Court Justice Jackson, the United States prosecutor at Nuremberg, stated that "**certainly no future lawyer or nation undertaking to prosecute crimes against the peace of the world will have to face the argument that the effort is unprecedented, and therefore, by inference, improper**". (Glueck, S., *Nuremberg Trial and Aggressive War,* Forward P. xi, Knopf 1946). Yet, petitioner in attempting to remain free of complicity in what he contends is a criminal conspiracy and in attempting to challenge the unconstitutional application of the draft to him in exercise of his right to "due process" has faced the opinion of the

Courts below that these issues, the United Nations Charter and other treaties *are* "improper".

Justice Jackson stated at Nuremberg that "**if certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us.**" (*International Conference on Military Trials,* Dept. of State Pub. No. 3880, p. 330) Petitioner has been unable in the Courts below to have such a criminal code as well as a substantial body of additional International Law and Constitutional provisions invoked in his defense. The continuation of such a position by the Courts and the continued refusal to test the defense of petitioner on the merits will amount, in effect, to a repudiation—not just of due process for petitioner—but of the whole body of International law that is part of of the "supreme law of the land". This would be paramount to declaring the right of international lawlessness for the United States and the obligation of United States citizens to submit to the policy of the government—even if that policy may prove to be unlawful.

All that petitioner is asking is before he may be convicted of a crime of violating a draft board order, that its constitutional validity not be presumed and that there be a judicial resolution by the normal legal processes of trial and evidence of whether or not the order is the end product of a constitutional process or of an unconstitutional one. Petitioner here has been denied not only national "due process of law" under our Constitution but the international "due process" envisioned when this Nation became signatory to the United Nations Charter and other international treaties, agreements and assurances to which the United States is a party.

Under Article VI, Clause 2 of the United States Constitution, these treaties and their obligations are part of

"the supreme Law of the Land; and the Judges in every State shall be bound thereby." The duty thus rested on the courts below and now ultimately on this Court to construe and apply these obligations to the facts at issue and not to slough off the undeclared "war" in Viet Nam, as the Court so casually did below, as an unrelated event in fact and law to the allegedly valid draft board order that petitioner violated on the ground that it had been manufactured by a Constitutionally invalid process, and as a step in violation of various treaties including the United Nations Charter. If the process initiated by the President, concurred in by the Congress and executed by the draft board is a constitutionally valid one, that conclusion should easily emerge from the fires of a trial on the merits. If it is not, it is the duty of the judiciary so to declare.

The Court below pretended that the draft board order is not related to the war in Viet Nam and therefore that war does not come within judicial cognizance. It thus retreated from the consequences of upholding the doctrine that "the concept of substantive due process (is) is limitation upon all powers of Congress, even the war power, see *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 155." (*Galvan* v. *Press*, 347 U. S. at 530).

> ". . . The war power of the United States, like its other powers and like the police power of the states, is subject to applicable constitutional limitations. (Ex parte Milligan, 4 Wall. 2, 121-127, *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505, 571; *McCray* v. *United States*, 195 U. S. 27, 61; *United States* v. *Cress*, 243 U. S. 316, 326, 251 U. S. at 156.)"

Why then should petitioner not have a chance to prove and to require the courts below to determine on the merits his defense of constitutional invalidity of the process that manufactured and led to his draft board order?

II.

All the powers invested in the President, the Congress and the Executive and executed by the draft board, insofar as they relate to the use of the armed services, and the power to conscript, are limited by the Constitutional Policy that they be exercised solely, as stated in the Constitution's Preamble, "for the Common Defence." Whether the military activities in Viet Nam and the related draft board order are for the purpose of a "defence" of the United States or in the words of Senator Fulbright not "in the interests of this country" or in the words of Rev. Dr. Niebuhr "a fantastic adventure of United States imperialism in an Asian civil war" is an issue of fact that petitioner, since he is threatened with deprivation of his liberty by 5 years in prison, is entitled to raise and have resolved under the "due process" clause of the Fifth Amendment.

It should be elementary that the Constitution does not authorize the President as Commander in Chief to obtain the cooperation of the draft board for an unconstitutional enterprise, "not in the best interests of this country" or for "a fantastic adventure of United States imperialism in an Asian civil war." If the draft board order is part of such an unconstitutional process, petitioner was not only correct in violating it but he was fulfilling his most solemn obligation as a citizen both of the United States and of the United Nations.

III.

Congress has no constitutional power to raise an army through the draft for a purpose that is "not in the interests of the country", is "a fantastic adventure of United States imperialism in an Asiatic civil war", and if submitted to proof would be shown to be unlawful. Petitioner under the "due process" guarantee of the Fifth Amendment had an absolute right to raise this issue, factually and legally, and the Courts below were required to allow petitioner to adduce his proof instead of excluding it erroneously as they did. . . . To call this a political question and not a legal question is a "play upon words" where "life, liberty, or property" is at stake (*Baker* v. *Carr*, 369 U. S. 186, 209, 211 and *Nixon* v. *Herndon*, 273 U. S. 536, 540).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. BOBRICK,
Attorney for Petitioner.

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 63—September Term, 1966.

(Argued November 7, 1966 Decided December 5, 1966.)

Docket No. 30521

UNITED STATES OF AMERICA,

Appellee,

v.

DAVID HENRY MITCHELL, III,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*

MEDINA and KAUFMAN, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the District of Connecticut, T. Emmet Clarie, *Judge.*

David Henry Mitchell, III, appeals from a judgment entered on a jury verdict convicting him of wilful failure to report for induction into the Armed Forces in violation of 50 U. S. C., Appx., Section 462. No opinion below. Affirmed.

Appendix A.

MEDINA, *Circuit Judge*:

David Henry Mitchell, III appeals from a conviction, after a trial to Judge Clarie and a jury, of wilful failure to report for induction into the Armed Forces in violation of 50 U. S. C., Appx., Section 462.

After initially registering with Selective Service Local Board 17, appellant "disaffiliated" himself from the Selective Service and thereafter refused to cooperate with his Board in any respect. In August, 1964, appellant was classified 1A and did not appeal. Subsequently, he was ordered to report for induction on January 11, 1965. Appellant acknowledged receipt of this notice by letter but did not report as ordered.

Appellant was indicted for violation of 50 U. S. C., Appx., Section 462, tried and found guilty. This Court reversed the first conviction because the trial judge had failed to allow sufficient time for appellant to obtain counsel. *United States* v. *Mitchell,* 354 F. 2d 767 (2 Cir. 1966). He was retried before Judge Clarie and a jury. The wilfulness of his failure to report for induction was all too apparent, and he was again convicted and sentenced to five years imprisonment. At trial appellant made no claim to be a conscientious objector but sought to produce evidence to show that the war in Vietnam was being conducted in violation of various treaties to which the United States is a signatory and that the Selective Service system was being operated as an adjunct of this military effort. Judge Clarie ruled out all such evidence as immaterial and this ruling is assigned as error.

The government, citing a line of cases beginning with *Falbo* v. *United States,* 320 U. S. 549 (1944), would preclude consideration of appellant's claims because of his failure to exhaust his administrative remedies. But, as appellant does not seek any relief which the Selective

Service is empowered to grant, we will assume these cases are not in point. Rather, he seeks a declaration, in effect, that the Service must cease to function. It would be pointless in this case to require appellant to press his claims before a Board which he claims is illegal.

Similarly, as appellant asserts that the Selective Service, and not merely the conduct of the war in Vietnam, is illegal, his defenses would seem not to be premature.

Nevertheless, appellant's allegations are not a defense to a prosecution for failure to report for induction into the Armed Forces and his evidence was properly excluded. Regardless of the proof that appellant might present to demonstrate the correlation between the Selective Service and our nation's efforts in Vietnam, as a matter of law the congressional power "to raise and support armies" and "to provide and maintain a navy" is a matter quite distinct from the use which the Executive makes of those who have been found qualified and who have been inducted into the Armed Forces. Whatever action the President may order, or the Congress sanction, cannot impair this constitutional power of the Congress.

Thus we need not consider whether the substantive issues raised by appellant can ever be appropriate for judicial determination. See *United States* v. *Hogans*, decided by this Court on November 28, 1966.

Affirmed.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of December one thousand nine hundred and sixty-six.

Present: HON. J. EDWARD LUMBARD,
Chief Judge,

HON. HAROLD R. MEDINA,

HON. IRVING R. KAUFMAN,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID HENRY MITCHELL, III,

Defendant-Appellant.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

DAVID HENRY MITCHELL, III,

Defendant-Appellant.

PETITION FOR REHEARING

Motion denied.

J.E.L.
H.R.M.
I.R.K.

U.S.C.J.J.

JAN-3 1967

Appendix D

International Treaties, Agreements and Assurances.

A. **Treaty for the renunciation of war** (46 Stat. 2343).

The treaty between the United States of America and sixty-one other powers (generally known as the Kellogg-Briand Pact) proclaimed by President Herbert Hoover, July 24, 1929, and published in 46 Stat. 2343 provides that the President of the United States, and the other signatory heads of States

> "Deeply sensible of their solemn duty to promote the welfare of mankind;
>
> Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that peaceful and friendly relations existing between their peoples may be perpetuated;
>
> Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty;
>
> Hopeful that, encouraged by their example, all the other nations of the world will join in this humane endeavor and by adhering to the present Treaty as soon as it comes into force bring their peoples within the scope of its beneficent provisions, thus uniting the civilized nations of the world in a common renunciation of war as an instrument of their national policy;
>
> . . . have agreed upon the following articles:
>
> Article I.
>
> The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international

controversies, and renounce it as an instrument of national policy with one another.

Article II.

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

President Hoover's proclamation of said treaty stated:

Now Therefore, be it known that I, Herbert Hoover, President of the United States of America, have caused the said treaty to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof."

B. **The United Nations' declaration and the Atlantic Charter** (55 Stat. 1600):

On January 1, 1942, the representatives of twenty-six nations that were fighting the war against the Axis Powers, Germany, Italy and Japan, signed in Washington, D. C., a Declaration of the United Nations. The text of the Declaration was, in part, as follows:

The Governments signatory hereto,

"Having subscribed to a common program of purposes and principles embodied in the Joint Declaration of the President of the United States of America and the Prime Minister of the United Kingdom of Great Britain and Northern Ireland, dated August 14, 1941, known as the Atlantic Charter . . .".

Appendix D.

The United Nations' Declaration and the Atlantic Charter were published in 55 Stat. 1600. The Atlantic Charter, among other things, stated:

"The President of the United States of America and the Prime Minister, Mr. Churchill, representing His Majesty's Government in the United Kingdom, being met together, deem it right to make known certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world.

First, their countries seek no aggrandizement, territorial or other;

Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned;

Third, they respect the right of all peoples to choose the form of government under which they will live; . . .

. . .

Sixth, after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all men in all lands may live out their lives in freedom from fear and want;

. . .

Eighth, they believe that all nations of the world, for realistic as well as spiritual reasons, must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside their frontiers, they believe, pending the establishment of a wider and

permanent system of general security, that the disarmament of such nations is essential. They will likewise aid and encourage all other practicable measures which will lighten for peace-loving peoples the crushing burden of armaments.

Franklin D. Roosevelt,
Winston Churchill.

Dated August 14, 1941."

In addition to the original twenty-six signatories to the United Nations Declaration, twenty-one other nations during World War II adhered to the Declaration.

C. **Charter of the United Nations** (59 Stat. 1031).

On June 26, 1945, the Charter of the United Nations was signed at San Francisco and after ratification by the United States Senate was proclaimed by President Truman to be effective October 24, 1945. In pursuance to law, the Charter and the President's Proclamation were published in 59 Stat. 1031. That Proclamation states that it was proclaimed:

"... to the end that the same and every article and clause thereof may be observed and fulfilled with good faith on and from the twenty-fourth day of October, one thousand nine hundred forty-five, by the United States of America and all other persons subject to the jurisdiction thereof."

By Article 2, Section 4, of the United Nations Charter it is provided:

"All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."

Appendix D.

One of the Purposes stated in the Charter of the United Nations is in Article I as follows:

> "1. To . . . bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situation which might lead to a breach of the peace."

One of the Ends stated in the Preamble of the Charter of the United Nations is

> "to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest,"

Article 103, of Chapter XVI (the Supremacy Clause) provides:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

D. **The agreement signed in London August 8, 1945, providing for the creation of the International Military Tribunal and the charter of the Tribunal** (59 Stat. 1544).

The Charter provided in part as follows:

> "II. **Jurisdiction and general principles**
>
> **Article 6.** The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as

members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) War Crimes; namely, violations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crimes within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Appendix D.

Article 7. The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8. The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

By Executive Order No. 9626 dated September 24, 1945 President Truman appointed the member and an alternate member of the United States of the International Military Tribunal.

E. **Control Council Law No. 10**

On December 20, 1945, the four occupying powers of Germany, acting through the four Zone Commanders, promulgated Control Council Law No. 10 in order

> ". . . to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal . . . (Official Gazette of the Control Council for Germany, Number 3, 31 January 1946, Berlin: Allied Secretariat, pp. 50-55)."

Law No. 10 was adopted from the London Charter with certain differences, one of which was that the definition of "crimes against peace," in other respects the same as

the Nuremberg Charter, included "invasions" as well as "wars" (thus furnishing a basis for charging the Austrian and Czechoslovakin conquests as crimes against peace). Article II, Sec. 2 of Law No. 10, provided for individual responsibility for the crimes defined in Section 1 as follows:

> "2. Any person, without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he
>
> a) was a principal or
>
> b) was an accessory to the commission of any such crime or ordered or abetted the same or
>
> c) took a consenting part therein or
>
> d) was connected with plans or enterprises involving its commission or
>
> e) was a member of any organization or group connected with the commission of any such crime or
>
> f) with reference to paragraph 1a), if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, cobelligerents or satellites or held high position in the financial, industrial or economic life of any such country."

F. Charter of the International Military Tribunal for the Far East, January 19, 1946.

The Charter was approved by the Supreme Commander for the Allied Powers January 19, 1946; it was amended by order of the Supreme Commander, General Headquarters, OPA 500, April 26, 1946. (Treaties and Other International Act Series 1589; Dept. of State Publication

2613; A decade of American Foreign Policy, 1941-1949, Senate Document 123, 81st Cong., 1st Session, p. 961.)

The Charter provides in pertinent part:

"II. **Jurisdiction and general provisions**

Article 5. Jurisdiction Over Persons and Offenses.

The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) **Crimes Against Peace:** Namely, the planning, preparation, initiating or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) **Conventional War Crimes:** Namely, violations of the laws or customs of war;

(c) **Crimes Against Humanity:** Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, . . . whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation of execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

Article 6. Responsibility of Accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his govern-

ment or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

G. **Affirmation of the principles of international law recognized by the Charter and Judgment of the Nuremberg Tribunal.**

On motion of the United States the first session of the General Assembly of the United Nations unanimously adopted a resolution affirming the principles of international law recognized by the Charter and Judgment of the Nuremberg Tribunal. [Res. 95 (I), adopted 11 December, 1946; The United States and the United Nations: Report by the President to the Congress for the year 1946, Dept. of State Pub. 2735, pp. 129-130; a Decade of American Foreign Policy, 1941-49, p. 965.]

BRIEF IN OPPOSI-TION TO PETITION FOR A WRIT OF CERTIORARI

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1012

DAVID HENRY MITCHELL, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 369 F. 2d 323.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1966. A petition for rehearing was denied on January 3, 1967. The petition for a writ of certiorari was filed on January 28, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a prosecution for failure to report for induction into the armed forces, petitioner was entitled, as a defense, to challenge the legality of the hostilities in Vietnam.

STATEMENT

After a trial by jury in the United States District Court for the District of Connecticut, petitioner was convicted of wilful failure to report for induction into the armed forces (50 U.S.C. App. 462), and on April 1, 1966, he was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. A).

At the trial, petitioner admitted having failed to report for induction after receiving an order to do so. His defense was that the Selective Service System was being unconstitutionally applied in that the United States was violating its treaty obligations by participating in the present hostilities in Vietnam (Pet. 7-9). The trial judge rejected, on grounds of materiality, efforts by petitioner to call witnesses and take depositions of persons who would testify that the presence of United States forces in Vietnam was illegal and that hostilities were being conducted there unlawfully (Pet. 9-10).

ARGUMENT

1. Petitioner's contention that the United States is engaged in an illegal war in Vietnam presents a political question which is inappropriate for resolution by the courts. The ability of the Chief Executive

to conduct the foreign affairs of this country would be impaired if every such decision were subject to judicial examination. This Court has often refused to consider questions which would have such harmful consequences on the conduct of foreign affairs and which are unsuited for judicial determination. See, *e.g.*, *Ludecke* v. *Watkins*, 335 U.S. 160, 170; *Chicago & Southern Airlines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111; compare *Luther* v. *Borden*, 7 How. 1, and see generally *Baker* v. *Carr*, 369 U.S. 186, 211-214. The district court was, therefore, correct in refusing to admit into evidence petitioner's proffered proof regarding the alleged illegality of the war.

2. In addition, petitioner lacks standing to raise the arguments which he advances for failing to report for induction. *Poe* v. *Ullman*, 367 U.S. 497; *Public Service Commission* v. *Wycoff Co.*, 344 U.S. 237; *United States* v. *Bolton*, 192 F. 2d 805 (C.A. 2). His attack on the constitutionality of the Selective Service System, predicated upon a challenge to this country's participation in the current conflict in Vietnam, involves no present case or controversy since his induction into the army would not necessarily result in his being sent to Vietnam. *United States* v. *Bolton*, *supra*; *Richter* v. *United States*, 181 F. 2d 591, 594 (C.A. 9), certiorari denied, 340 U.S. 892.

3. Finally, the treaties relied on by petitioner[1] do

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[1] The Kellogg-Briand Pact, the United Nations' Declaration and the Atlantic Charter, the Charter of the United Nations, the Charter of the International Military Tribunal, Control Council Law No. 10, and the Charter of the International Military Tribunal for the Far East (Pet. App. D).

not affect the constitutional power of the United States to compel petitioner to serve in the armed forces in any conflict in which this country is engaged. Nothing in the Charter of the International Military Tribunal (the Nuremberg Charter), on which petitioner chiefly relies (Pet. 14-15), or in any body of international decisional law suggests that individual soldiers are entitled to refuse to serve in wars with which they disagree. The right of Congress to raise armies by conscription has long been upheld under Article I, Section 8 of the Constitution. *E.g.*, *Selective Draft Law Cases*, 245 U.S. 366; *United States* v. *Williams*, 302 U.S. 46; *United States* v. *Henderson*, 180 F. 2d 711 (C.A. 7), certiorari denied, 339 U.S. 963; *Etcheverry* v. *United States*, 320 F. 2d 873 (C.A. 9), certiorari denied, 375 U.S. 930.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
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Attorneys.

FEBRUARY 1967.

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